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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

October 12, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Ms. Salas:

RE: Deployment of Wireline Services offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996. CC Docket No. 98-147 and CC Docket No. 96-98.

Enclosed please find an original and four (4) copies of the above-referenced pleading to be filed with the Secretary of the Commission on Thursday, October 12, 2000. We are also submitting these Comments on diskette to Janice Myles, Common Carrier, Policy and Program Planning Division. 445 12th Street SW, Washington, DC 20554. Additionally, we are sending a diskette copy of the Comments to International Transcription Service, Inc. 445 12th Street SW, Washington, DC 20554.

Thank you for your assistance in this matter.

Very truly yours,

Hope Thurrott

Enclosures

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of	)	
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	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
And	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 98-96

COMMENTS OF SBC COMMUNICATIONS INC.

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October 12, 2000

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COMMENTS OF SBC COMMUNICATIONS INC.

INTRODUCTION AND SUMMARY

SBC Communications Inc., on behalf of itself and its subsidiaries (collectively referred to as "SBC"), submits these comments in response to the *Second Further NPRM* in CC Docket No. 98-147 and the *Fifth Further NPRM* in CC Docket No. 96-98. The Commission asks a number of specific questions in these proceedings, and SBC responds to those questions in detail below. But simply going through the questions seriatim risks losing the bigger regulatory picture. The Commission's questions all point in the direction of imposing an increased operational, financial, and regulatory burden on incumbent local exchange carriers' ("incumbent LECs" or ILECs") provision of advanced services. Interjecting additional regulatory fiat into the competitive advanced services marketplace – and, in particular, burdening one technology but not others – would be contrary to the Telecommunications Act of 1996's ("1996 Act") and this

Commission's policy to allow market forces to replace government prescription in competitive markets.

The Commission's own factual findings prove that there is no bottleneck in the advanced services market. The Commission's latest report on advanced services recognizes that at least four major technologies can be used to provide advanced services: cable, digital subscriber line ("DSL"), fixed wireless, and satellite. The Commission's report also makes clear that cable is currently the market leader, with a whopping 77% market share at the end of 1999. The wireline network has no special advantage in providing the broadband infrastructure. On the contrary, the Commission has already concluded that the traditional telephone plant is "not ideally suited for broadband."[1] Existing copper loops are "not broad or fast enough to be called 'advanced.'"[2] Indeed, competitive local exchange carriers ("CLECs") such as Level 3 and Broadwing (formerly IXC) have fiber optic networks far more advanced for broadband technology than the incumbents' circuit-switched networks.[3]

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[1] Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 14 FCC Rcd 2398, 2422, ¶ 46 (1999) ("*1999 Advanced Services Report*").

[2] Notice of Inquiry, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 13 FCC Rcd 15280, 15281, ¶ 3 (1998).

[3] *See* FCC, Office of Plans and Policy, *The Digital Handshake: Connecting Internet Backbones*, OPP Working Paper No. 32, at 14-15 (Sept. 2000); C. Bell, *et al.*, Morgan Stanley Dean Witter, Investext Rpt. No. 2223046, *Level 3 Communications: Initiating Coverage – Company Report* at *8 (July 18, 2000); S. Baradar, Morgan Stanley Dean Witter, Investext Rpt. No. 2895789, *Global Telesystems Group: Initiating Coverage – Company Report* at *55 (July 15, 1999).

Although incumbent LECs have no advantage in this marketplace, the Commission's rules nevertheless place burdens on them that do not apply to other broadband providers. For instance, SBC is subject to restrictions imposed by 47 U.S.C. § 271 that preclude it, *inter alia*, from providing Internet backbone service and from manufacturing equipment, including customer premises equipment ("CPE"), for broadband services. Cable providers are subject to no such similar restrictions. SBC's ILECs face numerous unbundling, interconnection, and resale obligations, including collocation, line sharing, and forward-looking, cost-based pricing. The Commission has not imposed similar obligations on cable providers.

Thus, the regulatory gulf between the treatment of incumbent LECs and cable providers that provide advanced services is already a wide one. This asymmetric regulatory treatment places DSL at a distinct disadvantage and runs afoul of the Commission's and D.C. Circuit's position that regulation must adhere to the nature of a service that a carrier provides and not the nature of the carrier that provides it or the technology used to provide it.[4]

The Commission should therefore move to narrow the regulatory gap between DSL and cable, not widen it. It is not simply a question of treating ILECs fairly. It is a question of creating a competitive environment that fosters a variety of broadband technologies and that brings advanced services to as many consumers as possible. The Commission already recognizes that its role is "not to pick winners or losers, or select the 'best' technology to meet consumer demand, but rather to ensure that the marketplace is conducive to investment,

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[4] *See, e.g., National Ass'n of Reg. Util. Comm'rs v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976); *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994).

innovation, and meeting the needs of consumers."[5] The potential social costs of an intrusive regulatory regime are particularly severe when applied to new technologies, such as broadband facilities. As the Chairman of AT&T has acknowledged, "[n]o company will invest billions of dollars to become a facilities-based . . . services provider if competitors who have not invested a penny of capital nor taken an ounce of risk can come along and *get a free ride* on the investments and risks of others."[6] Whatever the impact of the Commission's unbundling and collocation rules on the *existing* telephone network, certainly no ILEC will undertake the significant risk of investing in *new* broadband technologies without the prospect of a commensurably significant reward. The combination of onerous unbundling and collocation requirements and TELRIC pricing would eviscerate an ILEC's incentive to deploy such technologies. And that would go against Congress's intent, which was "to accelerate rapidly private sector deployment of advanced telecommunications and information technologies." H.R. Conf. Rep. No. 104-458, at 1 (1996). Thus, far from promoting the public interest, such regulatory intervention hampers it. Consumers suffer when new technologies never enter the market because of disincentives created by a regulatory regime.

I. SECOND FURTHER NOTICE OF PROPOSED RULEMAKING IN CC DOCKET NO. 98-147

The 1996 Act limits the type of equipment that CLECs can physically collocate to "equipment necessary for interconnection or access to unbundled network elements at the

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[5] Memorandum Opinion, and Order and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* 13 FCC Rcd 24011, 24014, ¶¶ 2, 3 & n.6 (1998) ("*Advanced Services Order*").

[6] *Telecom and Cable TV: Shared Prospects for the Communications Future*, Remarks of C. Michael Armstrong, Chairman and CEO, AT&T, delivered to Washington Metropolitan Cable Club, Washington, D.C. (Nov. 2, 1998) (emphasis added), available at

premises of the local exchange carrier." 47 U.S.C. § 251(c)(6). In its *Advanced Services Collocation Order*,[7] the Commission sought to expand the types of equipment that competitors could collocate beyond this statutory authorization.

Revisiting its earlier decision in the *Local Competition Order*[8] to let state commissions decide, on a case-by-case basis, whether to permit competing carriers to collocate equipment that includes switching or enhanced service functions, the Commission decided that incumbent LECs were required to provide for collocation of *all* equipment that is "used or useful" for interconnection or access to unbundled network elements ("UNEs"), "*regardless* of whether such equipment includes a switching functionality, provides enhanced services capabilities, or offers other functionalities." 14 FCC Rcd at 4776, ¶ 28 (emphasis added). Thus, under the rules announced in the *Advanced Services Collocation Order*, incumbent carriers were required to permit competitors to collocate *any* equipment that was "used or useful" for interconnection or access to UNEs, even if only a portion of the equipment was actually used for those purposes. *Id.* at 4776-77, ¶ 28. The Commission's *Advanced Services Collocation Order* further held that incumbents were required to permit competitors to construct cross-connect facilities that would allow one collocating carrier to connect its collocated equipment to another collocating carrier's facilities (as opposed to the incumbent's facilities), even though such cross-connect facilities are

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<http://www.att.com/speeches/item/0,1363,948,00.html>.

[7] First Report and Order and Further Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 4761 (1999) ("*Advanced Services Collocation Order*").

[8] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15795, ¶ 581 ("*Local Competition Order*"), *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd in part, aff'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

neither "necessary" nor "used" nor even "useful" for interconnection with the *incumbent's* network. Under the *Advanced Services Collocation Order*, incumbents were also required to allow competitors to locate their equipment physically "in *any* unused space in the incumbent LEC's premises, without . . . the construction of a room, cage, or similar structure, and without . . . the creation of a separate entrance to the competitor's collocation space." *Id.* at 4784-85, ¶ 42 (emphasis added).

The D.C. Circuit expressly rejected each of these determinations and held that the 1996 Act does not authorize the expansive collocation regime established by the Commission. *See GTE Service Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000). The court held that the Commission's interpretation of "necessary" in section 251(c)(6) "diverge[d] from any realistic meaning of the statute, because the Commission has favored the LECs' competitors in ways that exceed what is 'necessary' to achieve reasonable 'physical collocation' and in ways that may result in unnecessary takings of LEC property." *Id.* at 421. The court noted that the definition of "necessary" is "fairly straightforward." *Id.* at 422. "Something is *necessary* if it is *required* or *indispensable* to achieve a certain result." *Id.* Thus, the D.C. Circuit made it clear that, under the 1996 Act, competitors have a right to collocate only that "equipment that is *required* or *indispensable* to achieve interconnection or access to unbundled network elements at the premises of the local exchange carrier." *Id.*

The D.C. Circuit agreed with the petitioners that the Commission's *Advanced Services Collocation Order* improperly allowed the collocation of multi-functional equipment that does "more than what is required to achieve interconnection or access." *Id.* The court held that allowing collocation of equipment that contains functions that are not necessary for interconnection or access to UNEs "impermissibly invites unwarranted intrusion upon LECs'

property rights" and is "overly broad and disconnected from the statutory purpose enunciated in § 251(c)(6)." *Id.* The court noted that the Commission's expansive interpretation of "necessary" to allow this type of equipment was especially troublesome because it "might result in an *unnecessary* taking of private property." *Id.* at 423. The D.C. Circuit rejected the Commission's attempt to justify the collocation of multi-functional equipment "by contending that 'competitive telecommunications providers must be permitted to collocate integrated equipment that lowers costs and increases the services they can offer their customers.'" *Id.* at 424. The court dismissed this as "precisely th[e] kind of rationale, based on presumed cost savings, that the Supreme Court flatly rejected in [*AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999)]." *Id.*

The court similarly rejected the Commission's cross-connect requirement, holding that the 1996 Act simply does not authorize it. The court determined that "the cross-connects requirement imposes an obligation on LECs that has no apparent basis in the statute." *Id.* at 423. The D.C. Circuit further held that "Section 251(c)(6) is focused *solely* on connecting new competitors to LECs' networks." *Id.* (emphasis added). Allowing one collocating competitor to interconnect with another collocating carrier is, therefore, not "necessary" under section 251(c)(6). The court rejected the Commission's attempt to justify its cross-connect requirement on the grounds that it is efficient and beneficial for CLECs:

> This will not do. The statute requires LECs to provide physical collocation of equipment as "necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier," *and nothing more*. As the Supreme Court made clear in *Iowa Utilities Board*, the FCC cannot reasonably blind itself to statutory terms in the name of efficiency. *Chevron* deference does not bow to such unbridled agency action.

Id. at 423-24 (emphasis added).

The court also rejected the Commission's holding in the *Advanced Services Collocation Order* that gave competitors the option of collocating in any unused space:

> The FCC offers no good reason to explain why a competitor, as opposed to the LEC, should choose where to establish collocation on the LEC's property; nor is there any good explanation of why LECs are forbidden from requiring competitors to use separate entrances to access their own equipment; nor is there any reasonable justification for the rule prohibiting LECs from requiring competitors to use separate or isolated rooms or floors.

Id. at 426. The D.C. Circuit held that "nothing in § 251(c)(6) . . . endorses" the approach that allows "competitors, over the objection of LEC property owners, . . . to pick and choose preferred space on the LECs' premises." *Id.* The court again rejected the Commission's attempts to justify the requirement on the basis of cost savings, concluding that, "as noted by the Court in *Iowa Utilities Board*, 'delay and higher costs for new entrants . . . [that may] impede entry by competing local providers and delay competition' cannot be used by the FCC to overcome statutory terms in the Telecommunications Act of 1996." *Id.* (quoting *Iowa Utils. Bd.*, 525 U.S. at 389-90).

The Commission must adhere to the D.C. Circuit's holdings in this proceeding. Any attempt to re-impose the multi-functional equipment collocation requirement, the cross-connect requirement, or the requirement allowing CLECs to choose any unused space in the central office for collocation would be at odds with both the court's decision in *GTE Service Corp. v. FCC* and the plain language of section 251(c)(6). It would also further widen the already large regulatory disparity between incumbent LECs and cable companies in the provision of advanced services. Given cable's already-commanding lead in the marketplace and the evidence of CLECs' ability to provision advanced services under the current regime, there is no rational basis for imposing the host of onerous new collocation requirements under consideration.

A. Meaning of "Necessary" Under Section 251(c)(6)

1. Equipment

The Commission seeks comments on how the term "necessary " should be defined in light of the D.C. Circuit's decision, particularly as the term relates to specified network equipment and other elements. The merits of these individual proposals are discussed more fully below. However, the D.C. Circuit's decision makes clear that the overarching consideration in the Commission's analysis must be whether the equipment in question serves the limited objective of Section 251(c)(6). It is not legally supportable for the Commission to expand the clear parameters of section 251(c)(6) by referring to the broader goal of the Telecommunications Act to promote greater competition and how the Commission believes those goals are met.[9] The D.C. Circuit vacated the Commission's previous definition of "necessary" for just this reason, that the Commission had sought to require collocation in situations beyond those in which it is statutorily permissible.

The D.C. Circuit, relying on the Supreme Court's opinion in *AT&T Corp. v. Iowa Utilities Board*, held that "necessary" in section 251(c)(6) "must be construed in a fashion that is consistent with the ordinary and fair meaning of the word, *i.e.*, so as to limit 'necessary' to that which is required to achieve a desired goal." 205 F.3d at 423. This goal is "connecting new competitors to LECs' networks." *Id.* Any equipment that is not necessary for achieving this

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[9] As noted above, increasing the regulatory burdens on ILECs may benefit individual competitors, but it does not benefit competition. On the contrary, it creates disincentives for ILECs and CLECs alike to invest in new technologies that bring advanced services to more consumers. Thus, even if the Commission were permitted to supercede the specific, express limitation in section 251(c)(6) and pursue the broader goals of the Act – which it is not – the collocation requirements under consideration would neither promote competition nor bring advanced services to more consumers.

objective is therefore not covered by the collocation authorization contained in section 251(c)(6). Indeed, it was on this basis that the Commission's previous rules relating to cross-connects and multi-functional equipment were vacated by the D.C.Circuit. Whether the collocation of certain equipment might be deemed by the Commission to serve a broader purpose, such as the promotion of competition in the advanced services market, is irrelevant because "a broader construction of 'necessary' under § 251(c)(6) might result in an *unnecessary* taking of private property." *Id.* Thus, before the Commission can impose a collocation obligation in relation to specific equipment, it must be able to demonstrate that the equipment is intrinsically required for connection to the ILEC's networks for purposes of interconnection or access to unbundled network elements. Mandating collocation for purposes other than this restricted goal not only would fall outside the Commission's statutory authority, but also would constitute an unlawful taking.

For this reason, it is irrelevant whether the D.C. Circuit's definition of necessary will exclude "much of the equipment that incumbent LECs and their competitors use to serve their customers," *NPRM* ¶ 74, the answer to that question is irrelevant under the terms of the 1996 Act and the D.C. Circuit's opinion. Similarly irrelevant is the Commission's query whether the "necessary" standard might be relaxed in order to allow CLECs to collocate the most efficient equipment for providing telecommunications services. *Id.* ¶¶ 77-78. The court rejected just such an argument with respect to the Commission's previous rules. The Commission told the court that it based its determination to allow the collocation of multi-functional equipment on evidence in the record that "'requiring competitive LECs to purchase single-function equipment would relegate competitors to less efficient equipment and create unnecessary roadblocks to competitive entry.'" Brief for Respondents at 40-41, Nos. 99-1176 & 99-1201 (D.C. Cir. filed

Nov. 29, 1999) ("FCC Br.") (quoting *Advanced Services Collocation Order*, 14 FCC Rcd at 4779, ¶ 31). The court held that the Commission's argument that CLECs should be permitted to collocate the same efficient equipment as ILECs "'diverges from any realistic meaning of the statute.'" *GTE*, 205 F.3d at 423-24 (citation omitted). The statute requires collocation only of equipment that is "'necessary'" and "nothing more." *Id.* at 423. The court repeated the Supreme Court's admonishment that the Commission is not free to "blind itself to statutory terms in the name of efficiency." *Id.* at 424. Congress limited the equipment that can be collocated to that which is necessary for interconnection or access to UNEs; Congress did not intend to have ILECs provide wholesale rental space for CLECs to collocate any type of equipment that they found to be efficient.

Similarly, although the Commission seeks comment on whether it should require an incumbent LEC to permit collocation of equipment with additional capabilities beyond those functions necessary for interconnection or access to UNEs (so-called "multi-functional" equipment), *NPRM* ¶ 77, the Commission is not writing on a blank slate. The D.C. Circuit already considered this very question in *GTE Service Corp. v. FCC* and concluded that the Commission cannot mandate collocation of multi-functional equipment that does "more than what is required to achieve interconnection or access." *Id.* at 422. The court held that requiring collocation of multi-functional equipment "impermissibly invites unwarranted intrusion upon LECs' property rights" and is "overly broad and disconnected from the statutory purpose enunciated in § 251(c)(6)." *Id.* The Commission cannot now disregard the D.C. Circuit's conclusion and simply re-establish its prior regime. The 1996 Act simply does not authorize the Commission to require the collocation of equipment other than equipment that is necessary for interconnection or access to UNEs. *See id.* at 424.

Indeed, requiring the collocation of multi-functional equipment would go beyond the statutory threshold and constitute an unauthorized taking of an incumbent's property. *Id.* at 423. Congress has authorized in section 251(c)(6) a taking of incumbents' property, but only a limited one. The D.C. Circuit's opinion makes clear that this limit must be obeyed, because a broad construction of "'necessary' under § 251(c)(6) might result in an *unnecessary* taking of private property." *Id.* And, under that limit, the collocation of multi-functional equipment that contains "more than what is required to achieve interconnection or access" (*id.* at 422) is unauthorized.[10] The D.C. Circuit's interpretation is the only one that is faithful to the language of the 1996 Act and the long-standing principle of construction that applies to takings.[11]

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[10] In addition, it should be noted that much of the multi-functional equipment falling under a broad definition of "necessary" utilizes more power, is considerably heavier (thus requiring greater floor loading parameters), and uses more HVAC than equipment that is truly necessary for interconnection or access. More importantly, in many instances this equipment *consumes more floor space* than basic interconnection equipment. For instance, Lucent manufactures both the SLC Series 5, which qualifies as equipment necessary for interconnection, and the EXM, which can be used for interconnection but also includes switching functionality. The footprint of the SLC Series 5 bay is 23 inches wide by 12 inches deep. By contrast, the footprint of the EXM bay is 30 inches wide by 24 inches deep. In this one example, the multi-functional equipment bay *consumes more than twice as much floor space* as the necessary equipment bay. In addition, approximately four to eight SLC Series 5 units fit into a single bay, whereas a single EXM unit consumes anywhere from four to seven bays. In other words, adopting an expansive definition of "necessary" that includes multi-functional equipment would clearly result in the taking of more ILEC central office floor space by CLECs than the statute authorizes.

[11] Courts have applied similar rules of strict construction to takings statutes for more than 100 years. *See, e.g., Delaware L. & W.R.R. v. Town of Morristown*, 276 U.S. 182, 192 (1928) ("[T]he taking of private property for public use is deemed to be against the common right and authority so to do must be clearly expressed."); *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1447 (D.C. Cir. 1994) ("strict test of statutory authority made necessary by the [takings] implications of the Commission's action"); *United States v. 67.59 Acres of Land*, 415 F. Supp. 544, 547 (M.D. Pa. 1976) ("[T]he exercise of [eminent domain] power is governed by express legislative authorization within well-defined congressional policies which necessarily must be strictly construed."); *United States v. 2,005.32 Acres of Land*, 160 F. Supp. 193, 200-01 (D.S.D. 1958) ("[A]ny statute allegedly authorizing eminent domain is to be strictly construed against the

The Commission needs to look no further than the D.C. Circuit's opinion, then, for the answers to its questions regarding the meaning of "necessary." Although the Commission's *NPRM* rephrases the question as whether it "must preclude collocators, including incumbent LEC affiliates, from deploying state-of-the-art equipment" in collocation space, *NPRM* ¶ 77, and whether limiting collocation would satisfy sections 251(c)(2) and (3), *id.* ¶¶ 81, 83, the Commission must first establish that it has statutory authorization to order collocation of equipment before it moves to the secondary question of whether that authorization can be scaled back. Similarly, before the Commission considers whether collocation is being provided on "rates, terms, and conditions that are just, reasonable, and nondiscriminatory," *id.* ¶ 76 (quoting 47 U.S.C. § 251(c)(6)), it must determine that a CLEC's equipment is lawfully collocated. That is, the threshold question is whether Congress has authorized the equipment to be collocated. As the D.C. Circuit's opinion and the 1996 Act's plain language make clear, the 1996 Act authorizes collocation only of equipment that is necessary for interconnection or access to UNEs. Sections 251(c)(2) and (3) provide no independent source of authority to order collocation. Indeed, the Commission has previously tried to assert that its power to regulate interconnection permits it to order collocation, and that position was squarely rejected as unauthorized by Congress. *See Bell Atlantic*, 24 F.3d at 1445-46.

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taking party."); *United States v. West Virginia Power Co.*, 33 F. Supp. 756, 759 (S.D.W. Va. 1940) ("Laws authorizing public officers to exercise the sovereign power of eminent domain are strictly construed."); *MacFarland v. Elverson*, 32 App. D.C. 81 (1908) ("[S]tatutes providing for the condemnation of private property for a public use must be strictly construed."); *United States v. Rauers*, 70 F. 748, 748 (S.D. Ga. 1895) ("A fundamental principle of law controlling all matters [involving takings] is that every statute which undertakes to appropriate in any manner the property of private persons for public use, must be strictly construed.").

Thus, before equipment may be collocated, it must satisfy the threshold standard of section 251(c)(6).[12] As the D.C. Circuit held, that standard mandates that collocated equipment be "directly related to and thus necessary, required, or indispensable to 'interconnection or access to unbundled network elements.'" *GTE*, 205 F.3d at 424 (quoting 47 U.S.C. § 251(c)(6)). There is, then, no room in this remand for the Commission to revisit this fundamental question of interpretation.

a. Switching, Advanced Services, and Ancillary Equipment

Under the statutory definition of "necessary," stand-alone switching equipment may not be collocated because it is not "necessary" for access to UNEs or for interconnection. *See Local Competition Order*, 11 FCC Rcd at 15795, ¶ 581 (concluding that stand-alone switching equipment is not "used for the actual interconnection or access to unbundled network elements"); *Advanced Services Collocation Order*, 14 FCC Rcd at 4778, ¶ 30 ("We continue to decline . . . to require incumbent LECs to permit the collocation of equipment that is not necessary for either access to UNEs or for interconnection, such as equipment used exclusively for switching or for enhanced services.").

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[12] Of course, an ILEC may voluntarily agree to the collocation of equipment. For example, the SBC ILECs have voluntarily agreed to permit collocation, under certain conditions, of some CLEC equipment that does not meet the requirements of section 251(c)(6). These offerings are made on a nondiscriminatory basis to all CLECs, including the SBC ILECs' own affiliates. These voluntary offerings have no bearing on whether a piece of equipment is "necessary" and, therefore, whether an ILEC can be *required* to permit its collocation under section 251(c)(6). Indeed, as the Commission itself has concluded, this equipment is "not . . . strictly necessary for interconnection or access to unbundled network elements." Second Memorandum Opinion and Order, *Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee For Consent to Transfer Control*, CC Docket No. 98-141, FCC 00-336, ¶ 36 (rel. Sept. 8, 2000) ("*Modification Order*").

Similarly, as the Commission recently acknowledged in its order modifying the SBC/Ameritech Merger Conditions, advanced services equipment such as optical concentration devices "may not be strictly necessary for interconnection or access to unbundled network elements." *Modification Order* ¶ 36; *see also Advanced Services Collocation Order*, 14 FCC Rcd at 4778, ¶ 30 (declining to require ILECs to permit collocation of enhanced services equipment because it is "not necessary for either access to UNEs or for interconnection"); *Local Competition Order*, 11 FCC Rcd at 15795, ¶ 581 ("section 251(c)(6) does not require collocation of equipment necessary to provide enhanced services").

Ancillary panels, equipment, or structures are also not "necessary" for interconnection or access to UNEs. Such ancillary panels, equipment, or structures include cross-connect panels and other simple frames, routers, portable test equipment, and cabinets for spares. Moreover, certain types of ancillary equipment, such as Battery Distribution Fuse Bays ("BDFBs"), that simply duplicate equipment used by the ILEC and/or functions performed by the ILEC as part of its provisioning of infrastructure systems for collocation are also not "necessary." Collocation of this equipment wastes space and other resources and, in some cases (such as BDFBs), harms the ILEC's ability to plan for and provide service to other customers, including other CLECs. Infrastructure systems include, but are not limited to, structural components, such as floors capable of supporting equipment loads, frames, HVAC systems, electrical systems (AC power), DC power, power distribution via frames and bays, high-efficiency filtration, humidity controls, remote alarms, compartmentation, and smoke purge systems.

Line cards also fail to satisfy the "necessary" threshold. *See NPRM* ¶¶ 82, 109. Line cards are not necessary for access to UNEs or for interconnection. The placement of an ADSL Line Unit ("ADLU") card into digital loop carrier ("DLC") equipment neither provides a CLEC

with access to UNEs nor does it provide for interconnection between the ILEC's network and the CLEC's network for the mutual exchange of traffic. A line card is essentially a circuit board that changes the function of a loop. It therefore fails to satisfy the statutory test for collocation. Moreover, the line card is a subcomponent of the next generation digital loop carrier ("NGDLC") remote terminal ("RT"). The line card has no stand-alone function. Nor does it have any physical termination capability. Thus, it does not constitute "equipment" as that term has been used by the Commission in the collocation context. The Commission's requirements for collocation always have involved complete units of equipment, not piece-parts or subcomponents that go inside of ILECs' equipment. *See* 47 C.F.R. § 51.323(b) (vacated in part by *GTE Service Corp. v. FCC*).[13] Thus, just as there is no obligation to allow CLECs to alter the software of an unbundled central office switch,[14] there can be no obligation to allow CLECs to reconfigure shared Digital Loop Electronics-Digital Subscriber Line ("DLE-DSL") equipment in an incumbent's RTs by inserting their own line cards.[15]

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[13] Similarly, in the recent *Modification Order*, the Commission found that ADLU cards in RTs are advanced services equipment, but continued to discuss collocation in the context of complete units of equipment, *e.g.*, NGDLCs or Digital Subscriber Line Access Multiplexers ("DSLAMs"). *Modification Order* ¶ 14.

[14] *See Local Competition Order*, 11 FCC Rcd at 15708, ¶ 415 (incumbent LEC retains control over operations of the switch); Memorandum Opinion and Order, *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20599, 20727, ¶¶ 217-218 & n.698 (1998) (Bell operating company ("BOC") must provide access to vertical features "loaded in the software of the switch").

[15] Allowing the collocation of line cards would also be unworkable. It would threaten to exhaust capacity. *See* Reply Comments of SBC Communications Inc. in Support of a Determination that SBC Incumbent LECs May Own Combination Plugs/Cards and Optical Concentration Devices at 15-16, CC Docket No. 98-141, *Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation, Transferor, to SBC Communications Inc., Transferee* (FCC filed Mar. 10, 2000).

b. Dark Fiber and Interoffice Transport Services

The Commission also asks whether, pursuant to section 251(c)(6), providers of dark fiber and interoffice transport services may collocate in incumbent LEC central offices. *See NPRM* ¶ 83. As discussed below, dark fiber and stand-alone competitive interoffice transport facilities are not necessary to connect a requesting carrier's facilities to the incumbent LEC's network because the requesting carrier always can connect directly to that network, and therefore cannot be collocated pursuant to section 251(c)(6).[16] In addition, providers of dark fiber and interoffice transport services would necessarily require cross-connects – which the D.C. Circuit held plainly are beyond the scope of section 251(c)(6) – to provide their dark fiber or interoffice transport services to other collocated carriers. Moreover, in the case of dark fiber, providers of such facilities are not providers of telecommunications services, and therefore are not entitled to collocation.

To analyze whether providers of dark fiber facilities may obtain collocation pursuant to section 251(c)(6), it is critical to understand the facilities they propose to collocate and how they intend to offer those facilities to other carriers. Providers of dark fiber facilities seek to pre-position dark fiber and fiber distribution frames in incumbent LEC central offices so that they may subsequently cross-connect the dark fiber facilities with the equipment of collocated

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[16] SBC notes that a requesting carrier that has collocated equipment to interconnect with the incumbent LEC's network or to access UNEs could, of course, collocate its own fiber transport facilities, including facilities provided by a third party on a subcontract basis. In that event, however, the collocation arrangement would be between the incumbent LEC and the collocating carrier, not the facility provider. In no event could a facility provider obtain collocation on a stand-alone basis because the provider would not be obtaining collocation in order to interconnect with the incumbent's network or to access UNEs to provide a telecommunications service, which, as the D.C. Circuit recognized, is the "sole focus" of section 251(c)(6). Rather, such facilities providers would be collocating to offer facilities and services to other collocating carriers, which is outside the scope of section 251(c)(6).

CLECs. These providers of dark fiber do not intend to light the fiber themselves, and thus do not provide a transmission service; rather, they intend only to lease dark fiber to CLECs, which will then provide the optical-electrical conversion equipment necessary to light the fiber and thus transmit information. For three separate reasons, providers of dark fiber are not entitled to collocate dark fiber facilities in incumbent LEC central offices.

First, providers of dark fiber facilities are not "telecommunications carriers" entitled to collocation pursuant to section 251(c)(6). As the Commission has previously determined, section 251(c)(6) requires an incumbent LEC to provide collocation only to requesting telecommunications carriers, and only so that such carriers can obtain interconnection or access to UNEs for the provision of a telecommunications service. In particular, the Commission has defined collocation as:

> [A]n offering by an incumbent LEC that enables a requesting telecommunications carrier to: (1) Place its own equipment to be used for interconnection or access to unbundled network elements within or upon incumbent LEC's premises; (2) Use such equipment to interconnect with an incumbent LEC's network facilities for the transmission and routing of telephone exchange service, exchange access service, or both, or to gain access to an incumbent LEC's unbundled network elements for the provision of a telecommunications service.

47 C.F.R. § 51.5. In the *Local Competition Order*, the Commission contrasted an ILEC's obligations under the Commission's *Expanded Interconnection* rules (which "encompass collocation for interstate purposes for all parties, including non-carrier end users, that seek to terminate transmission facilities at LEC central offices") with collocation under section 251(c)(6), which, the Commission held, "requires collocation *only* for '*any requesting telecommunications carrier.*'" 11 FCC Rcd at 15808, ¶ 611 (emphasis added).[17] Consequently,

[17] *See also* 47 C.F.R. § 51.323(a) ("An incumbent LEC shall provide physical collocation

only a telecommunications carrier is entitled to collocation pursuant to section 251(c)(6).

Under the 1996 Act, a "telecommunications carrier" is defined as "any provider of telecommunications services" (47 U.S.C. § 153(44)), which, in turn, is defined in relevant part as "the offering of telecommunications for a fee directly to the public." *Id.* § 153(46). "Telecommunications" is further defined by the Act as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(43). Incumbent LECs therefore are obligated to provide collocation only to requesting telecommunications carriers that themselves provide transmission services.

To the extent providers of dark fiber seek merely to cross-connect dark fiber to the facilities of collocated CLECs, they are not "telecommunications carriers" entitled to collocation under section 251(c)(6), but rather merely are suppliers of facilities to entities that are telecommunications carriers. In the *UNE Remand Order*, the Commission defined dark fiber as "fiber that has not been activated through connection to the electronics that 'light' it, and thereby render it capable of carrying telecommunications services."[18] Because dark fiber, by definition, is incapable of carrying telecommunications services, a provider of dark fiber facilities is not a telecommunications carrier, and, as such, is not entitled to the benefits of section 251(c),

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and virtual collocation to requesting telecommunications carriers.").

[18] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3776, ¶ 174 (1999) ("*UNE Remand Order*"). *See also id.* at 3843, ¶ 325 ("[D]ark or 'unlit' fiber, unlike 'lit' fiber, does not have electronics on either end of the dark fiber segment to energize it to transmit a telecommunications service.").

including the right to collocate pursuant to section 251(c)(6).[19]

Second, dark fiber is in no sense necessary to enable collocated CLECs to interconnect to an incumbent LEC's network or to access UNEs. CLECs routinely obtain interconnection with and access to incumbent LEC facilities without using dark fiber. Indeed, the fact that providers of dark fiber previously have not been permitted to collocate dark fiber in incumbent LEC central offices conclusively establishes that dark fiber is not necessary for interconnection or access to UNEs. Moreover, the fact that CLECs that would cross-connect to dark fiber providers' facilities necessarily would already be collocated in the incumbent LEC's central office further underscores that dark fiber is not necessary for interconnection or access to UNEs as required by section 251(c)(6).

Third, in order to provide stand-alone dark fiber facilities to collocated CLECs,[20] a dark fiber provider necessarily would have to be able to cross-connect its facilities to the facilities of

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[19] SBC notes that the Commission has previously ruled that an entity must provide telecommunications (*i.e.*, transmission) to obtain the benefits of section 251(c). The Common Carrier Bureau, for example, has rejected a claim by INFONXX, a provider of directory assistance ("DA") services, that NYNEX had unlawfully denied INFONXX unbundled access to NYNEX's DA database in violation of section 251 on the ground that INFONXX did not provide transmission of information. *INFONXX v. NYNEX*, 13 FCC Rcd 10288 (Comm. Car. Bur. 1998). In particular, the Bureau rejected as "untenable" INFONXX's claim that it was a "telecommunications carrier" because it did "not provide the *transmission* of information." *Id.* at 10295, ¶ 12. *See also id.* n.49 ("entities such as INFONXX that do not provide a transmission path are not providers of telecommunications (and thus are not 'telecommunications carriers' under the 1996 Act)") (citing Report to Congress, *Federal-State Joint Board on Universal Service*, FCC 98-67 ¶ 41 (rel. Apr. 10, 1998)). Because INFONXX was not a telecommunications carrier, the Bureau found that it was not entitled to access to NYNEX's DA database under section 251(c)(3). *Id.* at 10295, ¶ 12.

[20] SBC notes that a collocated CLEC that wishes to purchase dark fiber from an alternative provider of such facilities could always connect to such providers facilities outside the incumbent LEC's central office.

collocated CLECs, which, as discussed in more detail below, plainly is beyond the scope of section 251(c)(6). That is, even if a provider of dark fiber facilities were entitled to collocate such facilities in an incumbent LEC's central office, it would not be entitled to cross-connect those facilities to the equipment of collocated carriers pursuant to section 251(c)(6). As discussed below, in *GTE Service Corp.*, the D.C. Circuit vacated the cross-connect requirement because it found that the requirement "imposes an obligation on LECs that has no apparent basis in the statute." 205 F.3d at 423. The court noted that the Commission had not "even attempt[ed] to show that cross-connects are in any sense 'necessary for interconnection or access to unbundled network elements,'" and thus had exceeded its authority under the Act. *Id.* at 423-24. Because, as SBC demonstrates below, cross-connection among collocated carriers is not in any sense necessary, required or indispensable for collocating carriers to interconnect with an incumbent LEC's network or to access UNEs, incumbent LECs have no obligation under section 251(c)(6) to permit it. And, concomitantly, an incumbent LEC cannot be required to provide collocation to a provider of stand-alone dark fiber facilities, which necessarily would depend on cross-connects to provide such facilities to legitimately collocated carriers.

For similar reasons, an incumbent LEC cannot be required to provide collocation to providers of interoffice transport services pursuant to section 251(c)(6).[21] Like dark fiber, facilities used to provide interoffice transport services are not necessary to enable collocated CLECs to interconnect to the incumbent LEC's network or to access unbundled network

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[21] Of course, a provider of interoffice transport services could obtain collocation pursuant to the Commission's *Expanded Interconnection* rules. In addition, it can provide such services as a subcontractor to a carrier that legitimately has obtained collocation pursuant to section 251(c)(6). Again, as with dark fiber, in that scenario the collocation arrangement would be between the incumbent LEC and the legitimately collocated carrier, not the provider of interoffice transport services.